In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1027

POCONO INTERNATIONAL CORPORATION AND CHARLES GOLDBERG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, a corporation and an individual, contend that the evidence was insufficient to sustain their convictions for mail fraud, selling lots not registered under the Interstate Land Sales Full Disclosure Act, and land sales fraud in violation of that Act. They also contend, as to the fraud convictions, that they were convicted for offenses not charged in the indictment.

Following a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted on seven counts of mail fraud (18 U.S.C. 1341), seven counts of land sales fraud (15 U.S.C. 1703(a)(2)), and six counts of sale of unregistered land (15 U.S.C. 1703(a)(1)).[1] Petitioner Goldberg

[1]As part of the counts of selling unregistered land, petitioner Pocono International Corporation was also charged and convicted of selling land without timely delivery of a Property Report (15 U.S.C. 1703(a)(.)).

was sentenced to concurrent 18-month terms of imprisonment on each of the six counts charging sale of unregistered land. He was placed on probation for four years on the remaining fourteen counts, with imposition of sentence suspended. The corporate petitioner was fined a total of $37,500.

1. Under the Interstate Land Sales Full Disclosure Act of 1968, 82 Stat. 590, as amended, 15 U.S.C. 1701 *et seq.*, it is unlawful for a developer or his agent to use interstate facilities[2] for the sale of lots unless the subdivision is registered with the Department of Housing and Urban Development. The subdivision is registered when a "Statement of Record" and a "Property Report" disclosing information describing the subdivision, its title, and other prescribed matters of interest to prospective purchasers, becomes effective. 15 U.S.C. 1703(a)(1),[3] 1705-1707. The Property Report, a required part of the Statement of Record (24 C.F.R. 1710.20(a) and (e)), must be furnished in advance to prospective purchasers. The registration becomes effective 30 days after filing, unless suspended by HUD for incompleteness or inaccuracy; if suspended, the Statement becomes effective 30 days after satisfactory correction. 15 U.S.C. 1706. Registration is effective only as to the lots specified in the disclosure statements. 15 U.S.C. 1703(a)(1).

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[2]There is no dispute that interstate facilities were used here.

[3]15 U.S.C. 1703(a)(1) provides in pertinent part:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —
>
> (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser * * * .

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2. The evidence is detailed in the opinion of the court of appeals (Pet. App. 3a-8a). In 1972 Pocono International Corporation (PIC) sold, through an agent, unimproved residential lots in a subdivision of Hickory Run Forest, PIC's development in Penn Forest Township, Pennsylvania. Petitioner Goldberg was PIC's chief operating officer and a principal stockholder in the company (Tr. 1039-1054).

As to the counts charging the sale of unregistered land to six purchasers, the evidence showed that petitioners sold lots to four purchasers before any Statement of Record had been filed for the subdivision involved; petitioners failed to furnish three of these purchasers with the required Property Report before the sales. Petitioners also sold lots to two other purchasers on the day of filing, thirty days before the registrations became effective. In addition, petitioner sold 125 other unregistered lots, of which 115 were sold prior to the filing of the Statement of Record (Pet. App. 4a-5a).

The fraud counts involved sales to seven named purchasers (seven counts charging violation of the mail fraud statute, and seven counts charging violation of the Interstate Land Sales Full Disclosure Act). The fraud arose from petitioners' representations that purchasers would be able to dispose of sewage by a conventional septic tank system at an average cost per lot of $600 (Pet. App. 6a-7a), and that this method "has been approved by the Penn Forest Township Supervisors under ordinance of the township and pursuant to rules and regulations and standards of Pennsylvania Department of Health" (Pet. App. 18a). The representations were made in the

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Statements of Record, the Property Reports[4] and oral statements made to three purchasers by salesmen (Pet. App. 6a; Tr. 812, 830-831, 843, 962). In fact, because of high water table conditions known to petitioners (Tr. 1061-1065), these seven lots were unsuited to conventional subsurface sewage disposal and required a more expensive special above-ground sand filter system known as a "turkey mound" (Pet. App. 7a; Tr. 687-694, 697-714). According to the policy and practice of the Pennsylvania Department of Environmental Resources and the local township in which the lots were located, no permit would be issued by the township for a turkey mound or other sophisticated septic system without prior state approval (Tr. 569-570, 785-787, 899-900, 906, 967-992, 1096-1099). This policy was known to the project engineer (Tr. 568-570), who had advised petitioner Goldberg that twenty percent of the lots had severe soil limitations requiring special systems which could be installed only with state approval (Tr. 416-417, 421, 424-426, 1061-1065).

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[4]The court of appeals found (Pet. App. 18a):

> The Property Report advised that the buyer could provide for sewage disposal by constructing a septic tank at an average cost of $600, which method, according to the developer's consulting engineer, "is acceptable for the subdivision under current state and local health regulations," that in some instances "additional corrective work in the form of construction of a sand filter bed may be necessary to permit installation of a septic tank," bringing the total cost of sewage facilities to $1,200, that a permit must first be obtained from local authorities, that the buyer should first determine the availability of the permit from local authorities and that "[t]he developer has obtained a letter from the Penn Forest Township Supervisors that the use of septic tanks and other on-lot sewage disposal facilities will be approved for use in Hickory Run Forest subdivision upon issuance of a permit."

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3. Petitioners contend that they should not be subject to a criminal penalty for sale of unregistered lots because the evidence shows that their violation was not willful (Pet. 22-24). The court of appeals held, however, that the verdicts were sustained by the evidence (Pet. App. 15a). That evidence was ample to show that the violations were willful.[5]

In a successful high-pressure real estate operation, many lots may be sold in a short time. In the interval between the start of sales and a late filing, potential purchasers are without the disclosure Congress intended for their protection. Thus Section 1703(a)(1) (n. 3, *supra*) prohibits a land developer from using interstate facilities "to sell * * * *any* lot in *any* subdivision unless a statement of record with respect to such lot is in effect * * *" (emphasis added). Petitioners were fully aware of these requirements, since they had previously registered other subdivisions of Hickory Run Forest as required by the statute (Pet. 12). Nevertheless, they argue that their violations were merely an innocent late filing, because the subdivision was finally registered "only 78 days after the first sale charged in the indictment" (Pet. 24), and that, in consequence, the violations were not willful. This contention is inconsistent with both the letter and the purpose of the statute to assure that prospective purchasers of undeveloped land are informed "not only of the desirable aspects but also

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[5]In the court below, petitioners argued that the convictions for unregistered land sales must be reversed as to Goldberg because the evidence "was so weak as to be nearly insufficient to go to the jury" (Br. for Appellants, p. 49). The petition appears to present this argument with respect to both petitioners (Pet. 14). However the corporate petitioner did not present this argument below, and therefore it is not properly before this Court with respect to it. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

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of any undesirable aspects." S. Rep. No. 1123, 90th Cong., 2d Sess. 110 (1968). Moreover, the criminal sanctions in the statute would be seriously weakened if a developer who made substantial numbers of sales without effective disclosure statements on file could simply avoid criminal liability by late registration. Since "late registration" thus frustrates the statutory scheme, the jury was fully justified in finding willful violations, which are the intentional flouting of a known legal duty. Cf. *United States* v. *Bishop*, 412 U.S. 346, 360. Especially, is such a finding warranted where, as in this case, the record shows fraudulent representations in the sale of some of the lots and over a hundred sales prior to the filing of any Statement of Record (Tr. 1081).[6]

4. Petitioners also contend that the evidence was insufficient to sustain their fraud convictions.[7] They claim that the jury improperly found false their representations concerning the approval process for septic tanks and similar systems, because the jury relied on an erroneous interpretation of an allegedly vague regulation issued by the State Department of Environmental Resources (DER). Petitioners insist that their representations in fact

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[6]The evidence also shows that petitioner Goldberg was aware of the duty imposed by the statute. Subsequent to the commencement of sales efforts, which began as early as April 1972 (Tr. 1156), the project engineer, with Goldberg's knowledge and assistance, acquired plot maps and other documents for the unregistered lots, which Goldberg knew were a prerequisite to HUD registration (Tr. 113-117, 407-408). A broker hired by Goldberg to complete the HUD registration obtained the signature of the president of PIC on the Statement of Record, and a check for the HUD registration fee from Goldberg (Tr. 360-361). In addition, Goldberg personally handled correspondence related to the six sales which were the subjects of the registration counts (Govt. Exh. 45D, 46B, 52F, 56F).

[7]Only Goldberg raised this issue below.

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were based on an accurate recital of a letter to the developer from the local township supervisors. However, as the court below found, the district court's interpretation not only gave effect to the literal language of the regulations, but it was consistent with the purpose of the Pennsylvania Sewage Facilities Act under which they were issued. That purpose was to delegate to local officials the task of approving conventional septic systems under guidance of DER standards, while reserving approval of complex or experimental systems to the state agency (Pet. App. 10a-13a). Alternatively, as the court of appeals concluded (Pet. App. 13a-14a):

> In any event, defendants' convictions here do not turn solely upon the district court's interpretation of the foregoing regulations. Whether or not the regulations were vague or the DER's construction of them strained, appellants knew that DER had insisted in practice that its approval would be required for turkey mounds or similar exotic systems (such as aerobic tanks or evapo-transpiration beds), and that the Township, although it would issue permits for standard conventional systems, would not issue a permit for such unconventional systems unless DER approval had first been obtained. Nevertheless the defendants not only failed to advise the purchasers of the lots for which defendants were convicted that DER approval for turkey mounds or aerobic tanks would be required but falsely stated that "*This method of sewage disposal* [i.e., septic tanks costing approximately $600 each] *has been approved by the Penn Forest Township Supervisors*" and that the developer has obtained a letter from the Supervisors that "the use of septic tanks and other on-lot sewage disposal facilities *will be approved* for use in Hickory Run Forest subdivision upon issuance

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of a permit." (Emphasis supplied). In fact the method of sewage disposal utilizing septic tanks of the type that could be installed at a cost of $600 each had not been approved by the Township for the lots in question. Nor did the Township's letter to PIC (dated May 3, 1971) state that it would approve "the use of septic tanks and other on-lot sewage disposal facilities" of the type that might involve construction of a sand filter bed, much less that it would approve "turkey mounds." The Township's letter simply stated that it would approve septic tanks and other on-lot sewage disposal facilities for use in HRF "upon issuance of a permit under ordinance of this township and pursuant to rules, regulations and standards of the Pennsylvania Department of Health, all as required under the Pennsylvania Sewage Facilities Act." (A. 153). The letter amounted to nothing more than a statement that the Township would give whatever approval it was permitted to give under state and local law. Viewed as a whole this evidence together with the other proof, was sufficient to permit the jury to find the defendants guilty of the fraud charges.

The standard of review thus applied by the court below does not conflict with *United States* v. *Steinhilber,* 484 F. 2d 386 (C.A. 8). That case, a prosecution for willfully making untrue material statements in a Statement of Record, turned on its particular record.[8]

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[8]The availability of civil remedies does not, as petitioners argue, preclude the application of criminal sanctions. See, *e.g., Spies* v. *United States,* 317 U.S. 492, 495.

5. Petitioners contend that the indictment was constructively amended by a theory of fraud first postulated by the government at trial. Petitioners assert that the government's original theory claimed misrepresentations by petitioners to the effect that conventional subsurface septic tank systems could be installed, when petitioners knew that the lots involved in this case required additional subsurface corrective work. During trial, they claim, the government began asserting that petitioners knew that above-ground "turkey mound" systems were required. But as the court below found, "the term 'conventional system,' which significantly is used in the introductory part of the indictment, was defined at trial and understood by all parties to be merely a cryptic colloquial method of referring to the type of simple standard system *which would require only Township, as distinguished from DER, approval*" (Pet. App. 9a; emphasis supplied). This theory of fraud was consistent with the government's evidence, which showed that above-ground "turkey mounds" required state DER approval and were more expensive. Thus no new theory of fraud was added at trial; the fraud alleged was the fraud proved.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H BORK,
Solicitor General.

APRIL 1976.

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[9]The Court need not consider petitioners' claim (Pet. 14) that the evidence of land sales and mail fraud was sufficient to sustain only six valid counts as to PIC and three valid counts as to Goldberg. PIC did not raise this contention in the court of appeals, and, as to it, the claim therefore is not properly before this Court. (See n. 5, *supra*.) Goldberg was convicted on seven counts of land sales fraud and seven counts of mail fraud and received a suspended sentence on all fourteen. His case is thus appropriate for discretionary application of the concurrent sentence rule. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

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